85-709 (1)

Supreme Court, U.S.
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OCT 22 1985
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CLERK

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

1985-86 TERM

RAYFORD HOWARD CAMPBELL, JR.,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA
Case No. 83-1986
First Division No. 754

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the Alabama Legislature violate the due process of law clause of the Fourteenth Amendment of the United States Constitution by enacting a minimum three (3) year mandatory imprisonment without possibility of parole and no maximum penalty criminal statute that is vague, indefinite and uncertain due to its failure to limit, define or even describe the substance, material or item, the possession of which is prohibited?

Did the Alabama Legislature violate the equal protection clause of the United States Constitution by enacting a minimum three (3) year mandatory imprisonment without possibility of parole and no maximum penalty criminal statute under which the imposition of sentence cannot be suspended, deferred or withheld unless

the prosecuting attorney decides the defendant provided substantial assistance in the identification, arrest, or conviction of defendant's accomplices, accessories, co-conspirators, or principals when the Alabama Code elsewhere provides a defendant who is sentenced to ten (10) years or less imprisonment has the right to request probation and the granting of probation is in the sole discretion of the trial court.

LIST OF PARTIES

The parties to this proceeding are Rayford Howard Campbell, Jr., the Petitioner, and the State of Alabama.

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REFERENCE TO REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

The conviction of Petitioner in the Circuit Court of Mobile County, Alabama, was affirmed by the Court of Criminal Appeals of Alabama on January 22, 1985; application for rehearing was overruled without opinion on February 26, 1985; and was affirmed by the Supreme Court of Alabama on July 12, 1985; application for reconsideration was denied without opinion on August 23, 1985.

GROUNDS INVOKING JURISDICTION

The statutory provision which confers jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. § 1257(3), which permits review by the Supreme Court of the United States by writ of certiorari of the judgment of the highest court of a state where any right, privilege or immunity

is specially set up or claimed under the Constitution, treaties or statutes of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

I. AMENDMENT FOURTEEN TO THE UNITED STATES CONSTITUTION

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

II. CODE OF ALABAMA (1975)

A. § 20-2-80(1).

> "Except as authorized in Chapter 2, Title 20:
>
> 1. Any person who knowingly sells, manufactures, delivers, or brings into this State, or who is knowingly in actual or constructive possession of, in excess of 1 kilo or 2.2 pounds of cannabis is guilty of a

felony, which felony shall be known as 'trafficking in cannabis.' If the quantity of cannabis involved:

"a. Is in excess of 1 kilo or 2.2 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of three (3) calendar years and to pay a fine of $25,000.00."

B. § 20-2-81.

"(a) Notwithstanding the provisions of Chapter 22, Title 15, with respect to any person who is found to have violated this article, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving a mandatory minimum term of imprisonment prescribed by this article.

"(b) The prosecuting attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this article and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard en camera. The judge hearing

the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance."

C. § 15-22-50.

"Circuit Courts and District Courts subject to the provisions and conditions hereinafter provided, may suspend execution of sentence and place on probation any person convicted of a crime in any court exercising criminal jurisdiction. The court shall have no power to suspend the execution of sentence imposed upon any person who has been found guilty and whose punishment is fixed at death or imprisonment in the penitentiary for more than ten (10) years. Except as provided in the preceding sentence, the court, after a plea of guilty, after the returning of a verdict of guilty by the jury or after the entry of a judgment of guilt by the court, may suspend execution of sentence and place the defendant on probation, or may impose a fine within the limits fixed by law and also place the defendant on probation."

D. § 20-2-2(15).

"MARIHUANA. All parts of the plant Cannabis sativa L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin. Such term does not

include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of the plant which is incapable of germination."

STATEMENT OF THE CASE

Indictment charged:

> "Rayford Howard Campbell, Jr., whose name is to the Grand Jury otherwise unknown than as stated, did, on or about April 20, 1983, unlawfully possess in excess of 2.2 pounds of a controlled substance, to-wit: marijuana, in violation of the Alabama Uniform Controlled Substances Act, a violation of § 20-2-80 of the Code of Alabama, against the peace and dignity of the State of Alabama."

§ 12-11-30, Code of Alabama (1975), confers exclusive original jurisdiction of all felony prosecutions in the Circuit Court in the district wherein the alleged offense occurred.

The federal questions sought to be reviewed by this petition were first raised in Petitioner's motion to dismiss the indictment which was filed in the Circuit Court of Mobile County, Alabama, prior to trial of your Petitioner. Said

motion to dismiss the indictment was denied by the trial court and, after jury trial in the Circuit Court of Mobile County, Alabama, wherein Petitioner was adjudged guilty, Petitioner was sentenced to three (3) years imprisonment and fined $25,000.00.

The Court of Criminal Appeals of Alabama affirmed Petitioner's conviction on January 22, 1985, and on February 26, 1985, said Court overruled Petitioner's Application for Rehearing without opinion.

Petitioner filed Petition for Writ of Certiorari to the Supreme Court of Alabama, and the Supreme Court of Alabama in opinion dated July 12, 1985, held:

> "We granted certiorari solely to consider the issue of whether § 20-2-80 is unconstitutional because it fails to fix a maximum sentence upon conviction.
>
> "Upon consideration of this issue, we affirm, based upon our decision in Ex parte: Robinson [MS. July 12, 1985] ____ So.2d ____ (Ala. 1985). Likewise, as to all of the issues raised by defendant,

we affirm the judgment of the Court of Criminal Appeals."

Petitioner filed Application for Reconsideration which was denied without opinion on August 23, 1985.

ARGUMENT

I.

The Alabama Legislature enacted a criminal statute with severe penalties with the ultimate question of fact being a term, i.e. cannabis, that was not and had not been defined or used before. A vague statute does not give adequate "notice of the required conduct to one who would avoid its penalties," Boyce Motor Lines v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367, 371 (1951), is not "sufficiently focused to forewarn of both its reach and coverage," United States v. National Dairy Products Corporation, 372 U.S. ____, 33, 83 S.Ct. ____, 598, 9 L.Ed.2d ____, 566, and "may trap the

innocent by not providing fair warning." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222, 227-28 (1972). Elsewhere in earlier criminal statutes the Alabama Legislature had prohibited the possession and sale of marijuana and had by separate criminal statute expressly defined the term marijuana at law. See § 20-2-70, Code of Alabama (1975), §20-2-2(15), Code of Alabama (1975). In the trafficking in cannabis statute, however, there is no definition of the term cannabis, and there is no reference nor is there any definition of cannabis as used in said trafficking statute found anywhere in the Alabama Code. Therefore, the trafficking in cannabis statute when it left the legislature was not complete in all its terms and is not definite and certain enough to enable every person, by reading the statute itself, to know what his rights and obligations are and to know

how the trafficking in cannabis statute will operate when executed.

II.

Under § 15-22-50, Code of Alabama (1975), any person in the State of Alabama sentenced to imprisonment for a term of ten (10) years or less has the right to request the Court suspend, defer or withhold execution of said sentence and place him on probation. The trafficking in cannabis article, however, removes the right to request probation from defendants convicted thereunder and places the privilege to request probation in the unbridled, uncontrolled, and subjective discretion of the district attorney. In addition, the trafficking in cannabis article requires defendants to earn the right to request probation by performing acts not required of any other criminal defendant in the State of Alabama.

This Honorable Court held in United

States v. Batchelder, 442 U.S. 114, 125, 99 S.Ct. 298, 60 L.Ed.2d 755, 766 (1979):

> "Selectivity in the enforcement of criminal law is, of course, subject to constitutional constraints.[9] ,..(9) The equal protection clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' Oyler v. Boyles, 368 U.S. 448, 456, 7 L.Ed.2d 446, 82 S.Ct. 501 (1962)."

The Alabama trafficking in cannabis statute and the punishment provisions thereof violate the equal protection clause of the United States Constitution by authorizing selective enforcement and selectivity in the enforcement of the punishment provision.

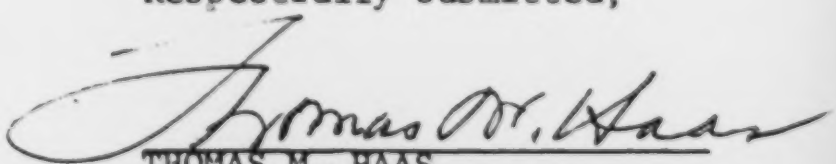
Denial of the right to request probation when sentenced to ten (10) years or less imprisonment solely because a defendant has been convicted of possession of in excess of 2.2 pounds of cannabis is selective enforcement based upon an

arbitrary classification. A murderer, rapist, robber, or possessor of less than 2.2 pounds of cannabis who is sentenced to ten (10) years or less automatically has the right to request the court suspend, defer or withhold execution of his sentence, and the denial of this right to request probation solely because a defendant possessed in excess of 2.2 pounds of cannabis is selective enforcement based upon an unjustifiable standard.

The second violation of the equal protection clause is in the provision of the sentencing statute which provides that, regardless of this mandatory minimum imprisonment without parole if the district attorney is satisfied that the defendant provided substantial assistance, he may move the court to defer, suspend or withhold sentencing.

This clearly authorizes the unbridled, unfettered, uncontrolled, and subjective selectivity in the enforcement of a criminal law to the district attorney. Requiring the prosecutor to move for probation based upon his own unbridled, uncontrolled and subjective judgment of substantial assistance before the court can examine the assistance and consider probation is an absolute bar to review of the prosecutor's subjective judgment and selectivity in the enforcement of the criminal law. Therefore, the sentencing provision of the Alabama trafficking in cannabis statute clearly violates the equal protection clause of the United States Constitution.

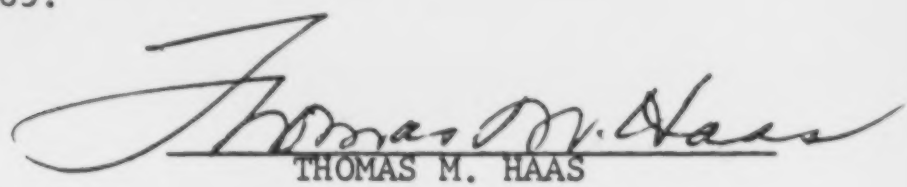
Respectfully submitted,



THOMAS M. HAAS
Attorney for Petitioner
255 St. Francis Street
Mobile, Alabama 36602

CERTIFICATE OF SERVICE

I, Thomas M. Haas, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served three (3) copies of this Petition for Writ of Certiorari on the Honorable Charles A. Graddick, Attorney General of the State of Alabama, by depositing same in the United States Mail, properly addressed and first class postage pre-paid on this the 22nd day of October, 1985.



THOMAS M. HAAS

APPENDIX

ORDER MOTION TO DISMISS INDICTMENT-DENIED

DATE FRIDAY, OCTOBER 28, 1983

STATE OF ALABAMA	Trafficking in
MASHBURN -vs-	Marijuana - Motion
CC83-1986	to Dismiss Indict-
Rayford Howard	ment filed by
Campbell, Jr.	Defendant's attor-
(Black Male -Age)	ney, Jim Byrd,
B.D. 12-17-57	August 30,
	1983 - Denied -
	Defendant's attor-
	ney, Jim Byrd, in
	court.

This day in open court came the State of Alabama by its District Attorney and defendant's Motion to Dismiss Indictment filed on the 30th day of August, 1983, coming on to be heard and being understood by the Court; It is ordered and adjudged by the court that the defendant's Motion to Dismiss Indictment filed on the

30th day of August, 1983, be and the same is hereby denied.

Thereupon in open court on this day, defendant's attorney, Jim Byrd, was in court.

JUDGMENT - SENTENCE - NOTICE OF APPEAL - EXECUTION OF SENTENCE SUSPENDED PENDING APPEAL - ORDER FIXING AMOUNT OF APPEAL BOND

DATE FRIDAY, NOVEMBER 18th, 1983

STATE OF ALABAMA Mashburn -vs-CC - 83 - 1986 Rayford Howard Campbell, Jr., (Black Male - Age) Grand Jury B.D. 12/17/57	Trafficking in Marijuana - Adjudged guilty - Sentenced to Penitentiary for 3 years - Fined $25,000.00 and costs-Notice of Appeal - Appeal Bond fixed at $15,000.00 - Defendant's attorney, Jim Byrd, in court.

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Jim Byrd, and the defendant was brought into open court on this day to receive sentence upon a conviction had against him for the offense of Trafficking in Marijuana.

Thereupon in open court on this day the defendant being asked by the court if he had anything to say why the judgment and sentence of the law should not be passed upon him, replied "he had not"; It is therefore considered and adjudged by the court that the defendant is guilty of the offense of Trafficking in Marijuana as charged in the indictment and that the State of Alabama for the use of Mobile County have and recover of the defendant the costs of this prosecution and that the defendant be sentenced to imprison-

ment in the Penitentiary of the State of Alabama for the term of Three (3) years

It is further ordered and adjudged by the court that the defendant also pay a fine of $25,000.00 and the costs of this prosecution.

And thereupon in open court at the time of sentence, the defendant gave notice of appeal, and moved the court to suspend the execution of the sentence pending appeal, and to fix the amount of an Appeal Bond.

It is therefore ordered and adjudged by the court that the execution of the sentence in this case be and the same is hereby suspended pending appeal, and that the amount of the Appeal Bond be and the same is hereby fixed at $15,000.00.

Thereupon in open court on this day, defendant's attorney, Jim Byrd, was in court.

JAN 22 1985

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1984-85

1 Div. 754

Rayford Howard Campbell

v.

State

Appeal from Mobile Circuit Court

CLARK, RETIRED CIRCUIT JUDGE

A jury found this appellant guilty on a trial under an indictment charging in pertinent part the following:

"RAYFORD HOWARD CAMPBELL, JR.(1)

"... did, on or about April 20, 1983, unlawfully possess in excess of 2.2 pounds of a controlled substance, to-wit:
Marijuana, in violation of the Alabama Uniform Controlled Substances Act, a violation of § 20-2-80 of the Code of Alabama."

The Court fixed his punishment at imprisonment in the penitentiary for a term of three years and assessed a fine against him of $25,000.00. § 20-2-80(1)(a) provides:

"Any person who knowingly sells, manufactures, delivers, or brings into this State, or who is knowingly in actual or constructive possession of, in excess of one kilo or 2.2 pounds of cannabis is

---

(1) The fact that defendant-appellant was indicted with the addition of "JR." and is otherwise referred to throughout the transcript as a junior is to be noted for the sake of accurary (sic) and in an effort to avoid any injustice to anyone else by a similar name, notwithstanding the fact that the caption of the record and the briefs of the parties on appeal do not show appellant as a junior.

guilty of a felony, which felony shall be known as 'trafficking in cannabis.' If the quantity of the cannabis involved:

"(a) Is in excess of one kilo or 2.2 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of $25,000.00."

According to the testimony of Sgt. William Lundy of the Mobile Police Department, attached to Narcotics Division, on April 20, 1983, while he had Denton Park under surveillance, he saw defendant, whom he knew, arrive at Denton Park in a pickup truck. On the same occasion, the witness saw Carl Stokes of the Mobile Police Department proceeding under cover, accompanied by a man by the name of Taylor, drive a motor vehicle into the park. Sgt. Lundy further testified that he looked in the pickup truck driven by defendant and saw the following:

"... A large grocery bag and a smaller bag that had several plastic bags in them with green plant material in them. The bags were on the floorboard of the pickup truck."

According to the testimony of Officer Stokes, he, accompanied by an informer by the name of Taylor, talked with the defendant on April 20, 1983, at a filling station and discussed a purchase from defendant of some marijuana on defendant's pickup truck. Officer Stokes was acting under cover at the time. The witness testified, "There was an arrangement between myself, Henry Taylor and the defendant to purchase five pounds of the marijuana for a certain price." He further said, "We left there and went directly to Denton Park, which is just around the corner on Emogene Street. Officer Stokes further testified that while at Denton Park he saw in the pickup truck "two grocery-bag type brown paper sacks"

and nine individual clear plastic bags with green plant material, which items were introduced in evidence by the State as State's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, which he turned in to Ms. Brodbeck, the lab technician at the City Lab, soon after he had identified himself to the defendant and placed him under arrest.

The defendant took the stand and emphatically denied that he had knowingly possessed marijuana. He said that Thomas had previously paid him fifty dollars to deliver a package for him and that on the occasion of defendant's arrest, defendant had been employed by Thomas to make another delivery of some material, which, contrary to defendant's knowledge, consisted of State's Exhibits Nos. 1 through 11.

Five issues are presented in appellant's brief, which we now consider.

I.

Appellant contends that Section 20-2-80, Code of Alabama (1975), contains such vague, indefinite and uncertain terms as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States of America. This is not a new contention. It was raised and determined in the case of Dickerson v. State, Ala. Cr. App., 414 So.2d 998, 1004-1005 (1982), in which Judge Tyson states:

> "Appellant contends that § 20-2-80 (1) is unconstitutional as it provides for no maximum sentence. Consequently, he argues that it is unconstitutionally vague and indefinite, and runs afoul of the doctrine of separation of powers expressed in Article III, § 43 of our Constitution.
>
> "....
>
> "Consequently, the limitation upon the trial court in sentencing under § 20-2-80(1) would be that of § 15, supra, as well as the Eighth Amendment to the United States Constitution made applicable

to the states through the Fourteenth Amendment.

"....

"Consequently, we find § 20-2-8(1) not unconstitutionally vague or indefinite as to its sentencing scheme or violative of the separation of powers doctrine of § 43, supra."

Appellant's first issue is without merit; it is contrary to the precedent of Dickerson v. State, supra.

II.

Appellant's second issue is thus stated:

"WHETHER CHARGING APPELLANT POSSESSED IN EXCESS OF 2.2 POUNDS OF MARIJUANA FAILS TO ADEQUATELY AND PROPERLY STATE AN OFFENSE?"

The first paragraph of appellant's argument as to this issue is as follows:

"Marihuana, as defined by law, and cannabis, as undefined by law, are not one and the same substances. Section 20-2-2(15), Code of Alabama (1975), limits marihuana to a specific genus of the cannabis plant, i.e. Cannabis sativa L. There is no limitation, definition, or description anywhere in the Alabama

Code as to the meaning of the term Cannabis."

We must recognize that the relatively new crime of possession or sale of marijuana, which came into existence in Alabama in 1971, by the Alabama Uniform Controlled Substances Act (Acts 1971, No. 1407, p. 2378, § 511) has been a source of some confusion, which has been due largely to the fact that there was involved the introduction into the law of this State of the subject of a vegetable product that was not indigenous to Alabama. As a result, legislators, lawyers and judges of Alabama looked elsewhere to ascertain the names, or names and synonyms, the use and usages of the product and their effects, as well as the chemical properties of the product, in order to protect the people of Alabama against the imported evil that has become gigantic. With this in mind, the Alabama Legislature enacted in 1980 the law now

codified as Code of Alabama 1975, §20-2-80, proscribing in part the crime charged in the indictment in the instant case.

In the first sentence of the argument of appellant's counsel in support of his second issue, he says, "Marihuana as defined by law, and cannabis, as undefined by law, are not one and the same substance." We disagree. Although much has been written in numerous dictionaries, encyclopedias, and an extraordinarily large number of reported cases, as to the meaning of "marijuana" and as to the meaning of "cannabis," we do not find anything therein to the effect that the two substances are not one and the same. The following is found at 28 C.J.S. Supp., § 3, Drugs and Narcotics (1974), p. 10:

> "Marijuana. The word 'marijuana' is of Mexican origin, and is variously spelled as 'mariguana,' 'marijuana,' 'mariahuana,' 'marajuana,' 'maraguana,' or 'marihuana.'

> Marijuana is not a scientific term; it is the Mexican name for 'cannabis sativa,' which is more commonly known as 'Indian hemp.' It is designed to mean a habit-forming substance used by addicts in the form of cigarettes; the narcotic product of the plant cannabis sativa; and while marijuana is not technically a narcotic, it is treated for all purposes just like an opiate, and usually it comes within such statutory terms as 'narcotics,' or 'narcotic drugs,' but not if it is expressly excluded therefrom, and where it is not classified as a narcotic or narcotic drug it may be classified as a dangerous drug, and marijuana may be classified as an injurious substance. A statutory definition of the word 'marijuana' has been held to include all varieties.
>
> "The word 'marijuana' is applied to both the plant and the drug which the plant contains, and the term signifies any part of the hemp plant or extract therefrom which induces somatic and psychic changes in man. As used in some statutes the term admits of no distinction between the growing plant and the drug."

Appellant further argues in his brief that, "There is no limitation, definition, or description anywhere in the Alabama Code as to the meaning of the term Cannabis." Nevertheless, at the

time the word "cannabis" came into the law of Alabama, the word had become a well defined one in the authoritative dictionaries of the United States at about the time "marijuana" had become a well defined word in such dictionaries, it appearing therefrom that Cannabis is the Latinization of the Greek word "Kannabis" and that the word "marijuana," however spelled, is a Spanish word, referred to as "Mexican Spanish," largely because of its propagation in Mexico. We quote from the American Heritage Dictionary (1969) in defining the two words as follows:

> "Cannabis.
>
> "#1. A plant of the genus Cannabis, hemp (see) 2. The dried flowery tops of the hemp plant. (See marijuana, hashish (New Latin, from Latin, hemp, from Greek Kannabis."
>
> "Marijuana, Marihuana. 1. A plant, hemp (see). 2. The dried flower clusters and leaves of the hemp plant, especially when taken to induce euphoria. Slang equivalents include 'weed,' 'pot,' 'Mary Jane,'

'tea,' 'sage,' 'grass,' and as a cigarette, 'reefer,' 'pot.' See hashish, bhang (Mexican Spanish Marijuana, Marihuana)."

Taber's Cyclopedic Medical Dictionary, Second Printing (1977) defines "marijuana" as follows:

"Also spelled marihuana. An intoxicating, excitant drug, usually in cigarette form and used illegally in the U.S. and elsewhere. Obtained from leaves and flowers of the Indian hemp plant. (Cannabis Sativa). Psychologically habituating but not habit-forming. Withdrawal of marijuana causes no such physical symptoms as opiate withdrawal does. Drug is considered to have no medical value."

The same contention as that made by appellant's second issue was soundly rejected by the Supreme Court of Colorado in Martinez v. People of Colorado, 417 P.2d 485, 486 (Colo. 1966), as follows:

"Without prolonging this opinion by engaging in an extended battle in semantics, we conclude as a matter of law that marijuana is identical with cannabis, as it is merely a geographically oriented name for cannabis. In support of

our conclusion, see People v. Savage, 64 Cal. App. 2d 314, 148 P.2d 654 and State v. Romero, 74 N.M. 642, 397 P.2d 26."

The issue is not well taken.

III.

By appellant's third issue, he takes issue with the testimony of the State's toxicologist on cross-examination, which appellant paraphrases as follows:

> "The state's toxicologist testified the material she tested was positive for the presence of tetrahydrocanabinol. Then in response to the question: 'That's what you mean by the word "marijuana"? Testrahydrocanabinal or a plant with that in it?' the state's toxicologist testified 'it's -- yes.' ..."

Appellant concludes his argument as to this issue by saying that according to the State's own evidence, "Appellant possessed tetrahydrocanabinol, but not marihuana as defined by law" and that for this reason "Appellant's conviction is due to be reversed." This proposition was decided adversely to appellant in

Haynes v. State, Ala. Crim. App., 54 Ala. App. 714, 312 So.2d 406, 414, cert. denied, 294 Ala. 758, 312 So.2d 414 (1975), in which a headnote by West summarized the holding as follows:

> "In light of fact that indictment charged possession of 'marijuana,' which is the older, more general term comprehending chemical characteristics of cannabis plant did not charge 'marihuana,' the term which is used in the Uniform Controlled Substances Act and which substitutes taxonomic definitive nomenclature to define prohibited substance as being all parts of the plant Cannabis Sativa L.(2) defendant was apprised by indictment that he was accused of possessing substances containing incriminating ingredient of tetrahydrocannabinol."

---

(2) The opinion quoted, at 54 Ala. App. 718, 312 So.2d 410, from 1973 Wisconsin Law Review 727, 8767, the following:

> "Cannabis is the genus name; sativa is the species name; and L. stands for Linnaeas who discovered and described marihuana."

See also, Sharpe v. State, Ala. Cr. App., 384 So.2d 633, 634 (1980), and previous cases there cited. We decide the third issue also adversely to appellant.

IV.

The following is the caption of appellant's fourth issue:

> "WHETHER THE TESTIMONY OF WEIGHT FROM SCALES OF PROVEN UNKNOWN ACCURACY IS REVERSIBLE ERROR."

The first paragraph of the argument in support of the issue is as follows:

> "The State in an attempt to prove the weight of the material Appellant possess (sic), asked the toxicologist (while testifying as a witness called by the State) 'how accurate are those (scales) to within, say, a gram? The toxicologist testified, 'I'm not sure. I don't know.' No additional question concerning the accuracy of the scales were ever asked, but, over repeated objections of failure to prove the accuracy of the weighing device, the toxicologist testified to the weight of the material."

The testimony of the toxicologist

was as to the weight of the "green plant material" in each of the nine clear plastic bags examined by the toxicologist. She testified that the total weight of said green plant material was over three thousand grams, or well over three times 2.2 pounds.. Perhaps the State should have shown by some witness whether the scales were accurate, but we are unwilling to conclude that merely because the witness was unable to say the scales were accurate "to within ... a gram," the scales were so inaccurate as to show that the material placed on them was three times weightier than it actually was. The defendant was not harmed by the admission in evidence of the toxicologist's testimony as to what the combined material contained in the nine plastic bags weighed.

V.

As his last issue, appellant con-

tends the trial court erred in failing to give defendant's requested written charge No. 6, which appellant quotes in his brief as follows:

> "I charge you, members of the jury, that unless the state proves from the evidence that Rayford Campbell possessed in excess of 2.2 pounds of cannabis excluding material stalks of the plant, fiber produced from the stalks, any other compound, derivative, mixture or preparation of the material stalk (except resin extracted therefrom), fiber or sterilized seed of the plant which is incapable of germination, you must find Rayford Campbell not guilty of trafficking in cannabis."

The charge assumes that the burden of proof was upon the State to show that the weight of the marijuana was "in excess of 2.2 pounds ... excluding material stalks of the plant, fiber produced from the stalks, any other compound, derivative, mixture or preparation of the material stalk, fiber or sterilized seed of the plant which is incapable of germination." This position of appellant

has been determined adversely to him in a number of cases, particularly in Dickerson v. State, supra, at 414 So.2d 1002, as follows:

> "It is well established that the burden is upon the appellant to establish and bring himself within any exclusion which is found not in the enacting clause defining a crime but rather in a subsequent clause or statute. Specifically, he must establish that the marihuana seized from his residence contained excludable matter falling within the definition of such under § 20-2-2(15)...."

The judgment of the trial court should be affirmed.

The foregoing opinion was prepared by Retired Circuit Judge Leigh M. Clark, serving as a judge of this Court under the provisions of § 6.10 of the Judicial Article (Constitutional Amendment No. 328); his opinion is hereby adopted as that of the Court.

AFFIRMED.

BOWEN, J., HARRIS, J., TAYLOR J., PATTERSON, J. CONCURRING. TYSON, J. CONCURRING WITH OPINION.

TYSON, J. concurring

I concur in the foregoing opinion as prepared by our able colleague, Judge Clark.

Several of our earlier opinions have discussed various aspects of the definition of the term "marijuana". See Haynes v. State, 54 Ala.App. 714, 312 So.2d 406, cert. denied, 294 Ala. 758, 312 So.2d 414 (1975); Hill v. State, 56 Ala.App. 369, 321 So.2d 708, cert. denied, 295 Ala. 405, 321 So.2d 713 (1975); Smith v. State, 335 So.2d 393 (Ala.Crim.App. 1976), cert. denied 335 So.2d 397 (Ala.Crim.App. 1976), cert. denied 335 So.2d 397 (Ala. 1976); Radney v. State, 342 So.2d 942 (Ala.

Crim.App. 1976), cert. denied, 342 So.2d 947 (Ala. 1977); Sharpe v. State, 384 So.2d 633 (Ala.Crim.App. 1980); Slaughter v. State, 411 So.2d 819 (Ala.Crim.App. 1981), cert. denied, 411 So.2d 819 (Ala. 1982); Collier v. State, 413 So.2d 396 (Ala.Crim.App. 1981), affirmed, 413 So.2d 403 (Ala. 1982); Dickerson v. State, 414 So.2d 998 (Ala.Crim.App. 1982) and Tucker v. State, 445 So.2d 311 (Ala.Civ.App. 1984).

THE ALABAMA COURT OF CRIMINAL APPEALS

Montgomery, Alabama

RE: CC 83-1986

1st Div. 754 Mobile Circuit Court

RAYFORD HOWARD CAMPBELL
Appellant

vs.

THE STATE
Appellee

This is to advise you that on FEB 26 1985 the Court of Criminal Appeals announced decision of:

Application for rehearing)
Overruled) No opinion

in the above stated cause.

Yours truly,

MOLLIE JORDAN, CLERK

Office Of
Clerk of the Supreme Court
State of Alabama
Montgomery

Re: 84-560

EX PARTE: RAYFORD HOWARD CAMPBELL, JR.
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS
(Re: Rayford Howard Campbell,
Appellant
vs.
State, Appellee)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

XXXX Petition for Writ of Certiorari to the Court of Criminal Appeals granted.
PER CURIAM
FAULKNER DIVISION CONCURS.

Oral argument has been granted in this cause. This case has been consolidated with 84-393 - Ex Parte: Aubrey Lee Robinson - for the purpose of oral argument only. Attorneys should consult Rule 39(f), ARAP, regarding the filing of additional briefs.

4/23/85
bsa

original signed
Robert G. Esdale, Clerk
Supreme Court of Alabama

FILED
JUL 12 1985
CLERK
SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1985

Ex parte: Rayford Howard Campbell

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Rayford Howard Campbell

84-560 v.

State of Alabama)

FAULKNER, JUSTICE.

Rayford Howard Campbell, Jr. was convicted of trafficking in cannabis in violation of Alabama Code 1975, §20-2-80 (1). The Court of Criminal Appeals affirmed the conviction. We granted certiorari solely to consider the issue of whether § 20-2-80 is unconstitutional

because it fails to fix a maximum sentence upon conviction.

Upon consideration of this issue, we affirm, based upon our decision in Ex parte: Robinson (Ms. July 12, 1985) ____ So.2d ____ (Ala. 1985). Likewise, as to all other issues raised by defendant, we affirm the judgment of the Court of Criminal Appeals.

AFFIRMED.

Torbert, C.J., Maddox, Jones, Almon, Shores, Embry, Beatty, and Adams, JJ., concur.

Office Of
Clerk of the Supreme Court
State of Alabama
Montgomery

Re: 84-560

EX PARTE: RAYFORD HOWARD CAMPBELL, JR.
PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS
(Re: Rayford Howard Campbell, Appellant
vs. State, Appellee)

You are hereby notified that the following action was taken in the above cause by the Supreme Court today:

XXXX Application for rehearing overruled.
No opinion written on rehearing.

8/23/85
bsa

original signed
Robert G. Esdale, Clerk
Supreme Court of Alabama